



Billing Code: 4410-A5

DEPARTMENT OF JUSTICE

Office of the Attorney General

[Docket No. OAG 144; AG Order No. 3391-2013]

Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence

AGENCY: Office of the Attorney General, Justice.

ACTION: Notice; solicitation of comments and preliminary expressions of interest.

SUMMARY: This notice proposes procedures for an Indian tribe to request designation as a participating tribe under section 204 of the Indian Civil Rights Act of 1968, as amended, on an accelerated basis, pursuant to the voluntary pilot project described in section 908(b)(2) of the Violence Against Women Reauthorization Act of 2013 (“the Pilot Project”), and also proposes procedures for the Attorney General to act on such a request. This notice also invites public comment on the proposed procedures and solicits preliminary expressions of interest from tribes that may wish to participate in the Pilot Project.

DATES: Preliminary expressions of interest from tribes are due on or before [INSERT DATE THAT IS 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments on the proposed procedures are due on or before [INSERT DATE THAT IS 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, 950 Pennsylvania Avenue, NW, Room 2310, Washington, DC 20530, e-mail OTJ@usdoj.gov.

FOR FURTHER INFORMATION CONTACT: Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, at (202) 514-8812 (not a toll-free number) or OTJ@usdoj.gov.

SUPPLEMENTARY INFORMATION:

In addition to mailing or e-mailing comments and preliminary expressions of interest to the Director, Office of Tribal Justice, you may submit comments and preliminary expressions of interest electronically or view an electronic version of this notice at <http://www.regulations.gov>. To ensure proper handling, please reference OAG Docket No. 144 on your correspondence. The Department of Justice strongly encourages electronic or e-mail submissions, as hard copies sent by mail may be subject to significant delays.

The electronic Federal Docket Management System will accept comments or preliminary expressions of interest until 11:59 p.m. Eastern Time on the last day of the relevant period. Late-filed comments and preliminary expressions of interest will be considered only to the extent practicable.

Posting of Public Comments. Please note that all comments and preliminary expressions of interest received are considered part of the public record and may be made available for public inspection online at <http://www.regulations.gov>. Such information includes personal identifying information (such as your name, address, etc.) that you might voluntarily submit.

You are not required to submit personal identifying information in order to comment or provide a preliminary expression of interest. If you want to submit personal identifying information (such as your name, address, etc.) but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your submission. You also must locate all the personal identifying information you do not want posted online in the first paragraph of your submission and identify what information you want redacted.

If you want to submit confidential business information but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the

first paragraph of your submission. You also must prominently identify confidential business information to be redacted within the submission. If a submission has so much confidential business information that it cannot be effectively redacted, all or part of that submission may not be posted on <http://www.regulations.gov>.

Personal identifying information and confidential business information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** section.

Discussion

1. Statutory Background

Overview

On March 7, 2013, President Obama signed into law the Violence Against Women Reauthorization Act of 2013 (VAWA 2013).¹ Title IX of VAWA 2013, entitled "Safety for Indian Women," contains section 904 (Tribal Jurisdiction over Crimes of Domestic Violence) and section 908 (Effective Dates; Pilot Project), both of which were initially drafted and proposed to Congress by the Department of Justice in 2011.² The purposes of these sections are to decrease domestic violence in Indian country, to strengthen the capacity of Indian tribes to exercise their inherent sovereign power to administer justice and control crime, and to ensure that perpetrators of domestic violence are held accountable for their criminal behavior.³

¹ Public Law 113-4, 127 Stat. 54 (2013); *see* Remarks on Signing the Violence Against Women Reauthorization Act of 2013, 2013 Daily Comp. Pres. Docs. 139 (Mar. 7, 2013).

² *See* Letter from Ronald Weich, Assistant Attorney General, to the Hon. Joseph R. Biden, Jr., President, United States Senate, at 1-2 & attachments (July 21, 2011).

³ *See* S. Rep. No. 112-153, at 8-11, 32 (2012); *see also* S. 1763, 112th Cong., at 1-2 (as reported by the S. Comm. on Indian Affairs, Dec. 27, 2012) (long title listing bill's purposes); H.R. 757, 113th Cong., at 1 (2013) (same).

Section 904 recognizes the inherent power of “participating tribes” to exercise “special domestic violence criminal jurisdiction” (SDVCJ) over certain defendants, regardless of their Indian or non-Indian status, who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country. Section 904 also specifies the rights that a participating tribe must provide to defendants in SDVCJ cases.

Section 908(b)(1) provides that tribes generally cannot exercise SDVCJ until at least two years after the date of VAWA 2013’s enactment—that is, on or after March 7, 2015. However, section 908(b)(2) establishes a “Pilot Project” that authorizes the Attorney General, in the exercise of his discretion, to grant a tribe’s request to be designated as a “participating tribe” on an accelerated basis and to commence exercising SDVCJ on a date (prior to March 7, 2015) set by the Attorney General, after coordinating with the Secretary of the Interior, consulting with affected tribes, and concluding that the tribe’s criminal justice system has adequate safeguards in place to protect defendants’ rights. This notice proposes procedures for tribes to make such requests and for the Department of Justice to grant or deny them, invites public comment on these proposed procedures, and also solicits preliminary expressions of interest from tribes that may wish to participate in the Pilot Project.

Domestic Violence in Indian Country

Congress found that Native American women suffer domestic violence and dating violence at epidemic rates, and often at the hands of non-Indian abusers.⁴ And Census data show

⁴ See S. Rep. No. 112-153, at 3, 7-11, 32 (2012) (citing studies); see also Tribal Law and Order Act of 2010, Public Law 111-211, tit. II, sec. 202(a)(5), 124 Stat. 2258, 2262.

that a large fraction of Indian-country residents are non-Indian and that tens of thousands of Native American married women have non-Indian husbands.⁵

Domestic violence and dating violence committed in Indian country by Indian abusers against their Indian spouses, intimate partners, and dating partners generally fall within the criminal jurisdiction of the tribe. But prior to the effective date of the tribal provisions in VAWA 2013, if the victim is Indian and the perpetrator is non-Indian, the tribe lacks criminal jurisdiction as a matter of federal law and the crime can be prosecuted only by the United States or, in some circumstances, by the state in which the tribe's Indian country is located. Even violent crimes committed by a non-Indian husband against his Indian wife, in the presence of their Indian children, in their home on the Indian reservation, cannot be prosecuted by the tribe.⁶ This jurisdictional scheme has proved ineffective in ensuring public safety. Too often, crimes go unprosecuted and unpunished, and the violence escalates.

The History of the Jurisdictional Gap

This jurisdictional gap has not always existed. In the early days of the Republic, tribes routinely, and with the United States' assent, punished non-Indians who committed acts of violence on tribal lands. For example, the very first Indian treaty ratified by the United States Senate under the Federal Constitution—the 1789 Treaty with the Wyandot, Delaware, Ottawa, Chippewa, Potawatomi, and Sac Nations—recognized that, “[i]f any person or persons, citizens

⁵ See S. Rep. No. 112-153, at 9 (2012); U.S. Census Bureau, 2010 Census Briefs, *The American Indian and Alaska Native Population: 2010*, at 13-14 & tbl. 5 (2012) (showing that 1.1 million American Indians and 3.5 million non-Indians reside in American Indian areas); U.S. Census Bureau, Census 2010 Special Tabulation, Census 2010 PHC-T-19, Hispanic Origin and Race of Coupled Households: 2010, *Table 1, Hispanic Origin and Race of Wife and Husband in Married-Couple Households for the United States: 2010* (2012) (analyzing married-couple households nationwide, regardless of whether they reside within or outside Indian country, and showing that more than 54% of Indian wives have non-Indian husbands).

⁶ The tribal provisions of VAWA 2013 are gender-neutral; but in the interests of brevity, this notice sometimes uses male pronouns or examples to describe perpetrators of domestic violence or dating violence and female pronouns or examples to describe their victims.

or subjects of the United States, or any other person not being an Indian, shall presume to settle upon the lands confirmed to the said [Indian tribal] nations, he and they shall be out of the protection of the United States; and the said nations may punish him or them in such manner as they see fit.”⁷ Similar language appeared in the last Indian treaty ratified before the Constitutional Convention—the 1786 Treaty with the Shawnee Nation.⁸

As recently as the 1970s, dozens of Indian tribes exercised criminal jurisdiction over non-Indians. But in 1978, in *Oliphant v. Suquamish Indian Tribe*,⁹ the Supreme Court created federal common law preempting the exercise of the tribes’ inherent sovereign power to prosecute non-Indians.¹⁰ The *Oliphant* Court noted, however, that Congress has the constitutional authority to override the Court’s holding and restore Indian tribes’ power to exercise criminal jurisdiction over non-Indians.¹¹ Then-Justice Rehnquist, writing for the majority in *Oliphant*, expressly stated that the increasing sophistication of tribal court systems, the protection of defendants’ procedural rights under the Indian Civil Rights Act of 1968,¹² and the prevalence of non-Indian crime in Indian country were all “considerations for Congress to weigh” in deciding whether to authorize Indian tribes to try non-Indians.¹³

Congress’s New Law Recognizing Special Domestic Violence Criminal Jurisdiction

In enacting VAWA 2013, Congress expressly recognized tribes’ inherent power to resume exercising criminal jurisdiction over non-Indians. That recognition extended, however,

⁷ Treaty with the Wyandot, Delaware, Ottawa, Chippewa, Potawatomi, and Sac Nations, art. IX, Jan. 9, 1789, 7 Stat. 28, 30.

⁸ See Treaty with the Shawnee Nation, art. VII, Jan. 31, 1786, 7 Stat. 26, 27.

⁹ 435 U.S. 191 (1978).

¹⁰ See *id.* at 195-212.

¹¹ See *id.* at 195 & n.6, 206, 210-12.

¹² Public Law 90-284, tit. II, 82 Stat. 77 (1968).

¹³ *Oliphant*, 435 U.S. at 212; see also *United States v. Lara*, 541 U.S. 193, 206 (2004) (holding that the Constitution allows Congress to override “‘judicially made Indian law’” (quoting *Oliphant*, 435 U.S. at 206) (emphasis added in *Lara*)).

only to crimes of domestic violence or dating violence and criminal violations of certain protection orders that occur in Indian country, in cases in which certain conditions are met. Specifically, the cases must have Indian victims, the defendants must reside in or have other specified significant ties to the prosecuting tribe, and the tribe's criminal justice system must have adequate safeguards in place to fully protect defendants' rights. Recognizing that many tribes may need time to implement those safeguards, Congress set an effective date two years after the enactment of VAWA 2013 (i.e., March 7, 2015), while giving tribes that are ready sooner the opportunity to participate in a Pilot Project at the Attorney General's discretion.

Section 904 of VAWA 2013 adds a new section 204 to the Indian Civil Rights Act of 1968 (ICRA).¹⁴ ICRA is codified at 25 U.S.C. 1301-1303. Section 204 of ICRA will be codified at 25 U.S.C. 1304, so this notice cites that United States Code section when referring to the new law.

The Pilot Project established by VAWA 2013's section 908(b)(2) focuses specifically on the power of a "participating tribe" to exercise SDVCJ under subsections (b), (c), and (d) of 25 U.S.C. 1304. A "participating tribe" is simply a federally recognized Indian tribe (as defined in 25 U.S.C. 1301(1)) that elects to exercise SDVCJ over the tribe's Indian country (as defined in 18 U.S.C. 1151).

Becoming a "participating tribe" and exercising SDVCJ—whether as part of the Pilot Project between now and March 2015, or at any time after March 2015—are entirely voluntary. There is absolutely no requirement, and no expectation, that any particular tribe or any specific number of tribes will choose to become participating tribes and exercise SDVCJ. VAWA 2013 does not impose an unfunded mandate upon any tribe or diminish the criminal jurisdiction of the

¹⁴ Public Law 90-284, tit. II, 82 Stat. 77 (1968).

United States. Tribes that do not choose to participate in the Pilot Project may nonetheless become participating tribes later, so long as they satisfy the statutory requirements.

SDVCJ, or special domestic violence criminal jurisdiction, is defined in section 1304(a)(6) to mean “the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.” Nearly all tribes that possess governmental powers over an area of Indian country can already exercise criminal jurisdiction over any Indian in that area (whether the defendant is a member of the prosecuting tribe or a “nonmember Indian”). For these tribes, therefore, SDVCJ effectively is confined to criminal jurisdiction over non-Indians. Here, the term “non-Indian” means any person who is not an Indian as defined in 25 U.S.C. 1301(4) and thus could not be subject to federal criminal jurisdiction under the Major Crimes Act, 18 U.S.C. 1153.¹⁵

The Nature of Special Domestic Violence Criminal Jurisdiction

Subsection (b) of section 1304 describes the nature of SDVCJ. Paragraph (1) of that subsection states that a participating tribe’s governmental powers include “the inherent power of that tribe, which is hereby recognized and affirmed, to exercise [SDVCJ] over all persons.” Congress patterned that language after the 1991 federal statute that expressly recognized and affirmed tribes’ inherent power to exercise criminal jurisdiction over all Indians, implicitly

¹⁵ Due to a Senate amendment, VAWA 2013’s section 910(a) provides that the amendments made by section 904, to be codified at 25 U.S.C. 1304, apply in Alaska only to the Indian country of the Metlakatla Indian Community, Annette Island Reserve. In addition, the Supreme Court held in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 526-34 (1998), that lands conveyed by the Alaska Native Claims Settlement Act of 1971, Public Law 92-203, 85 Stat. 688 (codified, as amended, at 43 U.S.C. 1601-1629h), do not constitute “Indian country.” Therefore, section 1304 will have no effect on the criminal jurisdiction of most Indian tribes in Alaska.

including nonmember Indians.¹⁶ The Supreme Court upheld the 1991 statute as a constitutional exercise of Congress's authority in *United States v. Lara*.¹⁷

Paragraphs (2) and (3) of subsection 1304(b) clarify that a participating tribe may exercise SDVCJ only concurrently, as the new law does not alter federal (or state) criminal jurisdiction. Importantly, the prohibition against double jeopardy does not prevent a defendant from being tried for the same conduct by more than one sovereign government. So, for example, a defendant who has been acquitted or convicted in a federal criminal proceeding can be tried for the same conduct in a subsequent tribal criminal proceeding. As is always the case when a case falls under concurrent criminal jurisdiction, coordination between jurisdictions will help ensure that investigative and prosecutorial resources are deployed efficiently and that the same defendant is not expected to appear at two different trials simultaneously.

Paragraph (4) sets forth two important exceptions to participating tribes' exercise of SDVCJ. First, subparagraph (A) provides that there is no SDVCJ over an alleged offense if neither the defendant nor the alleged victim is an Indian. Cases involving only non-Indians typically fall within a state's exclusive criminal jurisdiction. SDVCJ will be exercised in cases with Indian victims and non-Indian defendants. Second, subparagraph (B) limits SDVCJ to cases in which the defendant has significant ties to the participating tribe that is seeking to prosecute him. Specifically, the defendant must (1) reside in the tribe's Indian country; (2) be employed in the tribe's Indian country; or (3) be a spouse, intimate partner, or dating partner either of an Indian who resides in the tribe's Indian country or of a member of the tribe. Both of

¹⁶ Public Law 102-137, sec. 1, 105 Stat. 646 (1991) (permanent legislation) (codified at 25 U.S.C. 1301(2)); *see* Public Law 101-511, tit. VIII, sec. 8077(b), 104 Stat. 1892 (1990) (temporary legislation) (same).

¹⁷ 541 U.S. 193 (2004).

these two exceptions, as described in subparagraphs (A) and (B), are jurisdictional, so the prosecution will bear the burden of proving these jurisdictional facts beyond a reasonable doubt.

The Criminal Conduct Subject to Special Domestic Violence Criminal Jurisdiction

Subsection (c) of 25 U.S.C. 1304, the second of the three key subsections for present purposes, describes the criminal conduct potentially encompassed by a participating tribe's SDVCJ. The only types of criminal conduct that are subject to a tribe's exercise of SDVCJ are (1) acts of domestic violence or dating violence that occur in the tribe's Indian country, and (2) violations of certain protection orders that occur in the tribe's Indian country. The terms "domestic violence" and "dating violence" are defined in 25 U.S.C. 1304(a)(2) and (1), respectively.

Criminal conduct that occurs outside of Indian country is not covered. In addition, unless a violation of a protection order is involved, crimes of child abuse or elder abuse and crimes between two strangers (including sexual assaults) generally are not covered.

Subsection (c) limits the categories of criminal conduct that are subject to SDVCJ. It does not define any criminal offense. The criminal offenses and their elements are a matter of tribal, not federal, law.

The Rights of Criminal Defendants in SDVCJ Cases

Subsection (d) of 25 U.S.C. 1304, the third key subsection for present purposes, describes the federal statutory rights that participating tribes must provide to defendants when exercising SDVCJ. Although the United States Constitution, which constrains the federal and state governments, has never applied to Indian tribes (which were not invited to, and did not attend, the 1787 Constitutional Convention), that fact does not leave the rights of individual defendants in tribal courts unprotected. Both tribal law and federal statutory law provide important

protections for criminal defendants' rights. The tribal courts' application of the federal statutory rights described in subsection 1304(d) should be comparable to state courts' application of the corresponding federal constitutional rights in similar cases.

Subsection (d)(1)-(4) lists four sets of federal rights. The first set of defendants' rights, in paragraph (1), incorporates all rights under ICRA, 25 U.S.C. 1301-1304, that apply to a defendant in a criminal proceeding. This list of rights is substantively very similar (but not identical) to the set of criminal defendants' rights that are protected by the United States Constitution's Bill of Rights and have been incorporated into the Fourteenth Amendment's Due Process Clause and thus made fully applicable to the states. For example, ICRA prohibits tribes from compelling any person in any criminal case to be a witness against himself (akin to the United States Constitution's Fifth Amendment)¹⁸ and from denying to any person in a criminal proceeding the right to a speedy and public trial (akin to the Sixth Amendment).¹⁹ ICRA also prohibits a tribe from denying to any person within its jurisdiction the equal protection of its laws or depriving any person of liberty or property without due process of law.²⁰ Because federal law has required all tribes to protect these rights since Congress enacted ICRA in 1968, this list of rights should be familiar to tribal officials.

Furthermore, as amended by VAWA 2013, ICRA now requires a tribe that has ordered the detention of any person to timely notify him of his rights and privileges to petition a federal district court for a writ of habeas corpus and, where appropriate, to petition the federal court to stay further detention and release him from custody pending review of the habeas petition.²¹

¹⁸ 25 U.S.C. 1302(a)(4).

¹⁹ *Id.* 1302(a)(6).

²⁰ *Id.* 1302(a)(8).

²¹ *Id.* 1304(e).

Paragraph (2) of 25 U.S.C. 1304(d) requires a participating tribe exercising SDVCJ to provide defendants “all rights described in [25 U.S.C. 1302(c)]” in any criminal proceeding in which “a term of imprisonment of any length may be imposed.” The Tribal Law and Order Act of 2010 (TLOA),²² amended ICRA to add the five rights described in section 1302(c): (1) the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; (2) the right of an indigent defendant to the assistance of a licensed defense attorney, at the expense of the tribal government; (3) the right to a criminal proceeding presided over by a judge who is licensed to practice law and has sufficient legal training; (4) the right to have access, prior to being charged, to the tribe’s criminal laws, rules of evidence, and rules of criminal procedure; and (5) the right to a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

Under TLOA’s amendments to ICRA, codified in section 1302(c), these five rights must be provided to a defendant in any criminal proceeding in which the tribe imposes on the defendant a total term of imprisonment of more than one year. Therefore, these five rights are sometimes known as the “TLOA felony sentencing” requirements. In 25 U.S.C. 1304(d)(2), however, these same five rights must be provided to a defendant in any SDVCJ criminal proceeding in which the tribe imposes, or may impose, a term of imprisonment of any length. So indigent defense counsel, for example, is required in any SDVCJ misdemeanor case in which imprisonment may be imposed.

Paragraph (3) of 25 U.S.C. 1304(d) guarantees the right to a trial by an impartial jury that is drawn from sources that reflect a fair cross-section of the community and do not systematically exclude any distinctive group in the community, including non-Indians. Tribes

²² Public Law 111-211, tit. II, sec. 234(a)(3), 124 Stat. 2258, 2280.

exercising SDVCJ therefore will have to determine who qualifies as part of the relevant community and how lists of those persons may be obtained and regularly updated. The law does not require that every jury in every case reflect a fair cross-section of the community. Rather, the jury pool, or venire, from which the jury is drawn must be representative of the community. Some communities in Indian country contain sizeable non-Indian populations. Other communities in Indian country have few, if any, non-Indian members, and therefore inevitably will have few, if any, non-Indians in their jury pools. Under existing tribal laws, some tribes' jury pools already include non-Indians, while others do not.

Paragraph (4) of 25 U.S.C. 1304(d) is a “constitutional catch-all” provision. Although it is likely of little or no direct relevance to the Pilot Project, it has the potential to cause confusion and therefore merits further discussion here. The three prior paragraphs of 25 U.S.C. 1304(d) encompass all the rights that the 113th Congress concluded must be protected in order for Congress, acting within the constraints that the United States Constitution imposes on its authority, to recognize and affirm the participating tribes' inherent power to exercise SDVCJ over non-Indian defendants. The 113th Congress recognized, however, that the understanding of which rights are fundamental to our justice system can evolve over time. Therefore, Congress included paragraph (4), which requires a participating tribe to provide defendants in SDVCJ proceedings “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise [SDVCJ] over the defendant.”

This provision does not require tribal courts to protect all federal constitutional rights that federal courts are required to protect (for example, the Fifth Amendment's grand-jury indictment requirement, which state courts are also not required to protect). Rather, paragraph (4) gives

courts the flexibility to expand the list of protected rights to include a currently unforeseen right whose protection the 113th Congress did not believe was essential to the exercise of SDVCJ. In the two-year period of the Pilot Project, however, it seems unlikely that courts will hold that any such unforeseen right falls within the scope of paragraph (4).

Section 908, Effective Dates, and the Pilot Project

VAWA 2013's section 908 sets the effective dates for the three key subsections of 25 U.S.C. 1304—subsections (b), (c), and (d)—as well as establishing the Pilot Project. Section 908(b)(1) provides that those three subsections generally shall take effect on the date that is two years after the date of VAWA 2013's enactment, or March 7, 2015. So tribes generally cannot exercise SDVCJ until at least March 7, 2015. After March 7, 2015, any tribe that determines it meets the statutory requirements for exercising SDVCJ may do so. Approval from the Department of Justice will not be necessary.

An exception to the 2015 starting date, however, is set forth in section 908(b)(2), which establishes a Pilot Project that authorizes the Attorney General, in the exercise of his discretion, to grant a tribe's request to be designated as a participating tribe on an accelerated basis and commence exercising SDVCJ earlier. Section 908(b)(2) states in full:

(2) PILOT PROJECT.—

(A) IN GENERAL.—At any time during the 2-year period beginning on the date of enactment of this Act [March 7, 2013], an Indian tribe may ask the Attorney General to designate the tribe as a participating tribe under section 204(a) of Public Law 90–284 [to be codified at 25 U.S.C. 1304(a)] on an accelerated basis.

(B) PROCEDURE.—The Attorney General may grant a request under subparagraph (A) after coordinating with the Secretary of the Interior, consulting with affected Indian tribes, and concluding that the criminal justice system of the requesting tribe has adequate safeguards in place to protect defendants' rights, consistent with section 204 of Public Law 90–284 [to be codified at 25 U.S.C. 1304].

(C) EFFECTIVE DATES FOR PILOT PROJECTS.—An Indian tribe designated as a participating tribe under this paragraph may commence exercising special domestic violence criminal jurisdiction pursuant to subsections (b) through (d) of section 204 of Public Law 90–284 [to be codified at 25 U.S.C. 1304(b)-(d)] on a date established by the Attorney General, after consultation with that Indian tribe, but in no event later than the date that is 2 years after the date of enactment of this Act [March 7, 2015].

2. The Pilot Project

Given that the Pilot Project will directly and substantially affect Indian tribes in the next two years, the Department of Justice has engaged in expedited but extensive consultation with tribal officials on how best to design the Pilot Project. The procedures proposed here reflect valuable input received from tribal officials during consultation.

The Pilot Project’s Structure and Two Phases

Congress provided a structure for the VAWA Pilot Project that is atypical. A conventional pilot or demonstration program lasts for several years and culminates with a report evaluating the program’s success or failure and recommending that the program either be made nationwide and permanent or be discontinued. By contrast, here Congress has already determined that the key feature of the Pilot Project—tribes exercising SDVCJ—will spread nationwide just two years after VAWA 2013’s enactment. So the question raised by this Pilot Project is not whether to expand the exercise of SDVCJ, but rather how best to exercise SDVCJ. Thus, tribal leaders emphasized during consultation that one of the Pilot Project’s most important functions will be to support tribes in their efforts to collaboratively develop “best practices” that other (non-Pilot Project) tribes can use to implement SDVCJ in 2015 and beyond.

Tribal officials and employees repeatedly highlighted the usefulness of exchanging ideas with their counterparts in other tribes, peer to peer. They recognized that the Department of Justice, in coordination with the Department of the Interior, can play a key role in facilitating that

intertribal collaboration and exchange of ideas. That may well turn out to be a singular lasting legacy of this Pilot Project. Indeed, tribal officials pointed to the example of the Tribal Self-Governance Demonstration Project, which began in the late 1980s with fewer than a dozen tribes but has now expanded to include hundreds of tribes that are actively managing their own programs.²³

Consistent with and informed by the views expressed by tribal leaders during consultation, the Department of Justice therefore is proposing a VAWA Pilot Project process with two phases: a planning and self-assessment phase that commences with the publication of this notice, and an implementation phase that will commence with the publication of a final notice, which the Department anticipates will occur later this year. In Phase One, in the summer and fall of 2013, tribes that preliminarily express interest in the Pilot Project may engage in ongoing consultation with the Departments of Justice and the Interior to address any questions or concerns. These tribes will also be strongly encouraged to join the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG). Members of the ITWG will exchange views, information, and advice about how tribes can best exercise SDVCJ, combat domestic violence, recognize victims' rights and safety needs, and fully protect defendants' rights.

This peer-to-peer technical assistance may cover a broad set of issues, from drafting stronger domestic violence codes and victim-centered protocols and policies, to improving public defender systems, to analyzing detention and correctional options for non-Indians, to designing more broadly representative jury pools. The objective will be to develop not a single, one-size-

²³ See Public Law 100-472, sec. 209, 102 Stat. 2285, 2296-98 (1988).

fits-all “best practice” for each of these issues, but rather multiple “best practices” that can be tailored to each tribe’s particular needs, preferences, and traditions.

Tribes participating in the ITWG will also have an opportunity to engage with the Departments of Justice and the Interior, which will provide technical advice to the working group as a whole and work with individual tribes to address specific issues or concerns as needed. The Department of Justice will support the ITWG with training and technical assistance to the extent possible with available resources. Indeed, in section 1304(h), Congress expressly authorized funding “to provide training [and] technical assistance” to tribes’ criminal justice systems.

Phase Two of the Pilot Project process, the implementation phase, will commence with the Justice Department’s publication in the *Federal Register* of a final notice specifying how tribes can certify that they meet the statutory requirements to exercise SDVCJ on an accelerated basis. Some tribes will then request designation as a participating tribe under 25 U.S.C. 1304 on an accelerated basis, and the Department will timely evaluate the requests based on the statutory criteria, after the required consultation with affected tribes and coordination with the Department of the Interior. The tribes whose requests are granted may commence prosecuting non-Indian perpetrators of domestic violence on a date established by the Department of Justice after further consultation with the tribe. The Department anticipates that Phase Two likely will commence in late 2013 and continue through March 7, 2015, with some tribes potentially prosecuting SDVCJ cases by late 2013 or early 2014.

During consultation, tribal officials uniformly encouraged the Department to develop a mechanism for tribes to “self-certify” that they meet the statutory requirements to exercise SDVCJ. As a result, each requesting tribe will be expected to fill out an Application

Questionnaire that will ask the tribe to identify provisions of the tribe's criminal code, rules of procedure, and written policies, as well as actual practices, that qualify the tribe to exercise SDVCJ on an accelerated basis. Each requesting tribe will be asked to attach the relevant portions of its laws, rules, and policies to the completed Application Questionnaire. These materials, collected from the various tribes applying to participate in Phase Two of the Pilot Project, will serve as a great resource for the much larger number of tribes that may elect to commence exercising SDVCJ in March 2015 or later.

This two-phased Pilot Project will benefit tribes in several ways. First, the tribes that successfully apply in the Pilot Project's second phase will have the opportunity to commence exercising SDVCJ, and thus enhance public safety in their communities, sooner than would otherwise be possible. And these tribes will establish an early, strong track record for effectively and fairly prosecuting all offenders who perpetrate crimes of domestic violence in Indian country, regardless of their Indian or non-Indian status. Second, the other tribes that preliminarily express interest in the Pilot Project and opt to join the ITWG will have the opportunity to shape best practices that will strengthen criminal justice systems on many reservations, including their own, and thus will be better prepared to exercise SDVCJ after March 2015. And third, the tribes that do not participate in either phase of the Pilot Project will have the opportunity to learn from the experiences of the first two sets of tribes and to benefit from the body of tribal laws and practices that those tribes will have developed and implemented.

Phase One: Ongoing Consultation, Preliminary Expressions of Interest, and the Intertribal Technical-Assistance Working Group

If a tribe's elected leadership believes that the tribe might be a strong candidate for participation in both phases of the Pilot Project, and thus for exercising SDVCJ prior to 2015, the tribe may submit a "preliminary expression of interest." A preliminary expression of interest

should take the form of a short letter from the tribe's leader or governing body to Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, 950 Pennsylvania Avenue, NW, Room 2310, Washington, DC 20530, e-mail OTJ@usdoj.gov. The preliminary expression of interest should be submitted as soon as possible and in any event no later than [INSERT DATE THAT IS 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

A tribe that submits a preliminary expression of interest during Phase One will not be obligated during Phase Two to submit a request for designation as a participating tribe if the tribe decides to wait until after March 7, 2015, to commence exercising SDVCJ. Conversely, a tribe that wishes during Phase Two to submit a request for designation as a participating tribe (so that it can commence exercising SDVCJ before March 2015) need not have submitted a preliminary expression of interest during Phase One. However, submitting a preliminary expression of interest as early as possible will greatly facilitate the Justice Department's efforts to provide timely information to the tribe, to address issues of unique concern to the tribe, and to identify, in coordination with tribal officials, those areas where the tribe may benefit from technical assistance.

The letter preliminarily expressing interest also should identify the name and title of any person the tribe authorizes as its representative to the ITWG, if the tribe chooses to participate in the ITWG. This person should be a tribal officer, employee, or contractor who has been designated by the tribe's elected officers to act on their behalf and serve on the ITWG. The authorized representative could be, for example, a tribal leader, trial judge, appellate judge, attorney, prosecutor, public defender, victim advocate, victim service provider, police chief, criminal justice consultant, or court administrator. The tribe's authorized representative should

have the time, energy, and technical expertise to meaningfully participate in the ITWG. The Department of Justice anticipates that participation in the ITWG may demand a substantial time commitment, at least in 2013.

A tribe may choose to authorize more than one person to participate in the ITWG. For example, a tribe may want both a judge and a victim advocate, or both a prosecutor and a public defender, to contribute to the ITWG's discussions. But each tribe should designate one authorized representative who can serve as the main point of contact for the Justice Department and for other tribes.

The Department of Justice may ask particular federal employees (from the Departments of Justice and the Interior and perhaps other agencies) and non-federal experts (including persons affiliated with national or regional intertribal organizations) to provide support to the ITWG. And the Department will support the ITWG with training and technical assistance.

It is anticipated that the ITWG members will meet in person or by telephone, video conference, or interactive Webinar technology at least twice a month for the duration of Phase One of the Pilot Project. If funding is available, the Department may support travel expenses for ITWG members to attend in-person meetings. Members also will meet, perhaps less frequently, during Phase Two, to continue identifying, documenting, and disseminating best practices that can be replicated by other tribes, and to help collect data and assess the Pilot Project tribes' efforts to exercise SDVCJ, combat domestic violence, recognize victims' rights and safety needs, and fully protect defendants' rights.

After receiving timely preliminary expressions of interest from the tribes, the Department of Justice will help convene and facilitate the initial ITWG meeting. Although it is anticipated that federal employees ordinarily will be invited to participate in subsequent ITWG meetings as

observers or subject-matter experts who can provide technical assistance, the tribal representatives may choose sometimes to meet without any federal employees present. In addition, tribal members of the ITWG may informally exchange written drafts of tribal criminal code provisions, tribal rules of procedure, tribal policies, and other tribal best practices, with or without sharing these drafts with the federal employees. Tribal members of the ITWG also may opt to meet in smaller groups, arranged either by region or by subject-matter expertise.

The ITWG may choose to discuss anything that its members deem relevant to the proper implementation of sections 904 and 908 of VAWA 2013. The Department of Justice has appended to this notice a list of substantive questions that may provide a useful starting point in identifying key issues and developing a checklist of best practices for exercising SDVCJ. Some of the questions focus on statutory requirements. Others touch on broader issues that are potentially relevant to tribal best practices but clearly are not required by VAWA 2013 or any other federal law.

The principal goal of the ITWG will be to provide a forum for peer-to-peer learning as tribes assess their own criminal justice systems and prepare to exercise SDVCJ. Secondary goals of the ITWG will be to create a network of peer mentors, identify an array of different model codes and rules, and document best practices, all of which can assist other tribes as they prepare to exercise SDVCJ in the future.

Consistent with the views expressed during consultation, the ITWG has been designed to maximize the collaborative sharing of information among tribal governments. At the same time, the Department of Justice recognizes the importance of the government-to-government relationship that exists between the United States and each individual Indian tribe. During (or after) Phase One, any tribe may also engage in one-on-one discussions with the Department of

Justice or the Department of the Interior on any issue that may arise that is unique to that tribal government. Such discussions may involve specific requests for additional training or technical assistance if funding is available.

Phase Two: Tribal Requests and the Application Questionnaire

In Phase Two of the Pilot Project, tribes may request designation as participating tribes that may commence exercising SDVCJ on an accelerated basis. It is important to note that the statute does not set the number of tribes that can participate in the Pilot Project and exercise SDVCJ on an accelerated basis, though it does limit the Pilot Project to just two years, effectively ending in March 2015. After that time, any tribe that determines it meets the statutory requirements and wishes to exercise SDVCJ may do so without the involvement of the Department of Justice.

During the course of the Pilot Project, however, section 908(b)(2)(B) of the statute authorizes the Department of Justice to grant a request only after concluding that the requesting tribe's criminal justice system "has adequate safeguards in place to protect defendants' rights, consistent with [25 U.S.C. 1304]." Tellingly, Congress did not restrict the Department's purview to the rights of defendants specified in subsection 1304(d), but rather demanded consistency with all subsections of section 1304. The statute thus requires the Department to consider how the tribe plans to comply with the entirety of section 1304, focusing (though not exclusively) on the specific defendants' rights enumerated in subsection 1304(d).

The Attorney General is required to exercise his discretion in the Pilot Project process, as the statute states that he "may" (not "shall") grant a qualifying tribe's request. In exercising his discretion, the Attorney General will be bound by the text of section 1304 and guided by the section's broader purposes: to decrease domestic violence in Indian country, to strengthen the

capacity of Indian tribes to exercise their inherent sovereign power to administer justice and control crime, and to ensure that perpetrators of domestic violence are held accountable for their criminal behavior.

To address the overwhelming preference for a self-certification process that tribal leaders and experts expressed during consultation, and to facilitate moving quickly during the Pilot Project's two-year window while fulfilling the Attorney General's statutory duty, the Department will ask each requesting tribe to provide certified answers to a list of detailed questions. These questions may touch on matters such as the tribe's criminal justice system, its ongoing efforts to combat domestic violence and provide victim services and support, its history of ICRA compliance, and the various safeguards that the tribe has put in place to protect defendants' rights. The precise substance and form of the Application Questionnaire have not yet been determined. It will be appended to the final notice that the Department of Justice publishes in the *Federal Register* several months from now, and it will be informed by comments that the public submits in response to this notice and by lessons learned through the ITWG process.

However, some broad outlines are clear. The Application Questionnaire will need to be completed and certified as accurate by the tribe's chief executive, judicial, and legal officers. To provide an adequate basis for the Justice Department to make the determination demanded by the statute, the questions will need to be comprehensive and detailed. The bulk of the questions likely could be answered with a single sentence or a simple "yes" or "no," supplemented with applicable excerpts from the tribe's laws, rules, or policies. This way, the questionnaire will put as little burden as possible on tribal officials and employees, while addressing the Department's need for sufficiently detailed information to perform its statutory responsibility. The Application

Questionnaire also may help a tribe assess its own criminal justice system's readiness for the exercise of SDVCJ.

The completed, certified Application Questionnaire will serve as the tribe's formal request to be designated as a participating tribe that can exercise SDVCJ on an accelerated basis under the Pilot Project. The Department will give priority consideration to requests that it receives during the first 30 days after publication in the *Federal Register* of the final notice (not this notice). But the Department will consider all requests received before March 7, 2015. And although the Department strongly encourages tribes that may submit a formal request in Phase Two to join the ITWG during Phase One, the Department will consider Phase Two requests from both ITWG members and nonmembers.

Phase Two: The Federal Response to Tribal Requests

Once the Department of Justice has received a requesting tribe's completed, certified Application Questionnaire, including attached excerpts of tribal laws, rules, and policies, the Department proposes to take the following steps.

First, the requesting tribe's entire application will be shared with relevant components of the Department of Justice, including any U.S. Attorney's Office with jurisdiction over the tribe's Indian country, and relevant components of the Department of the Interior, including the Office of the Assistant Secretary of the Interior-Indian Affairs; the Office of the Solicitor of the Interior; and the Bureau of Indian Affairs' Office of Justice Services (BIA-OJS).

Second, the Justice Department will post a notice on its Tribal Justice and Safety website indicating that the tribe has submitted a request in Phase Two of the Pilot Project. This notice will announce a telephonic consultation for officials of federally recognized Indian tribes who wish to comment on the request, as well as a deadline for submitting written comments. As

required by VAWA 2013's section 908(b)(2)(B), the Justice Department will consult with elected and duly appointed officials of affected tribes, consistent with applicable Executive Orders and Presidential Memoranda on tribal consultation.

Third, generally working through the requesting tribe's authorized point of contact (POC), as identified in the tribe's Application Questionnaire, the Justice Department may make follow-up inquiries about the tribe's criminal justice system. But the specificity of the questions in the Application Questionnaire should minimize the need for extensive follow-up inquiries.

Fourth, personnel from the Departments of Justice and the Interior will coordinate in reviewing the requesting tribe's application. They also may consider information obtained in other contexts, including grant applications, such as the tribe's prior Coordinated Tribal Assistance Solicitation (CTAS) applications, and any tribal-court review that BIA-OJS has conducted under 25 U.S.C. 3612.

Fifth, Justice Department personnel will make a recommendation to the Associate Attorney General about whether the requesting tribe should be designated as a participating tribe under 25 U.S.C. 1304 on an accelerated basis. This recommendation will turn on whether the requesting tribe's criminal justice system has adequate safeguards in place to protect defendants' rights, consistent with all subsections of 25 U.S.C. 1304.

Sixth, if the recommendation is negative, the Justice Department's Office of Tribal Justice (OTJ) will so inform the tribe's POC. If funding is available, the Department may provide appropriate technical assistance to a tribe that wishes to prepare and submit a revised request. The Department may also offer specific training and technical assistance to address particular needs through its grant-making components, the Office of Justice Programs (OJP), the Office on Violence Against Women (OVW), and the Office of Community-Oriented Policing

Services (COPS), and may work with the ITWG to identify other tribal or intertribal resources that may assist the tribe.

Seventh, if the recommendation is positive, the Department of Justice will consult with the requesting tribe to establish a date on which the tribe may commence exercising SDVCJ. The commencement date may be conditioned on the tribe receiving certain additional training or technical assistance or taking certain steps, such as notifying the public when the tribe will start exercising SDVCJ.

Eighth, if the Department of Justice and the tribe can reach agreement on a starting date and conditions (if any), the Associate Attorney General, exercising discretion delegated by the Attorney General, may designate the tribe as a participating tribe under 25 U.S.C. 1304 on an accelerated basis. The Department will publish notice of the designation on the Department's Tribal Justice and Safety website and in the *Federal Register*.

3. Statutory and Executive Order Reviews

General Disclaimers

This notice is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party in any matter, civil or criminal, against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person, nor does this notice place any limitations on otherwise lawful litigative prerogatives of the U.S. Department of Justice.

Furthermore, nothing in this notice shall be construed to (1) encroach upon or diminish in any way the inherent sovereign authority of each tribe over its own government, legal system, law enforcement, and personnel matters; (2) imply that any tribal justice system is an

instrumentality of the United States; or (3) alter the trust responsibility of the United States to Indian tribes.

Administrative Procedure Act

This notice concerns interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice for purposes of the Administrative Procedure Act, and therefore notice and comment are not required under 5 U.S.C. 553(b)(A). Nonetheless, the Department of Justice is publishing this notice in the *Federal Register* and on the Department's Tribal Justice and Safety website for public comment, as well as to solicit preliminary expressions of interest in the Pilot Project.

Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

This notice fully comports with Executive Order 13175 of November 6, 2000. Although it creates no new substantive rights and imposes no binding legal requirements, the notice has tribal implications because it will have substantial direct effects on Indian tribes and their relationships with the Federal Government. The Department therefore has engaged in meaningful, though speedy, consultation and collaboration with elected and duly appointed tribal officials in developing this notice.

More specifically, the Department of Justice organized and led two telephonic consultations with tribal leaders on how best to structure and implement the voluntary Pilot Project established under sections 904 and 908 of VAWA 2013. To facilitate the consultation and frame the discussion with tribal governments, in mid-April the Department circulated a six-page framing paper that presented background on the new law and raised a series of questions on

specific issues relating to the Pilot Project.²⁴ The first consultation was held on May 14, 2013, and the second on May 17, 2013. The Department also consulted members and representatives of the Attorney General's Tribal Nations Leadership Council on April 30, 2013.

On April 12, 2013, the Department participated in a hearing of the Indian Law and Order Commission on implementation of VAWA 2013 and the Pilot Project, held in conjunction with the Federal Bar Association's 38th Annual Indian Law Conference in New Mexico. In addition, the Department held a series of informal consultations with tribal stakeholders, including calls with tribal judges and court personnel (on May 8, 2013); tribal prosecutors (May 13); tribal public defenders (May 2); federal public defenders (May 6); tribal in-house counsel (May 9); tribal victim advocates and victim service providers (May 1); and professors of Indian law (May 10). Finally, the Department received written comments from more than a dozen American Indian and Alaska Native tribes, members of the public, and intertribal organizations, including the National Congress of American Indians (NCAI), the National American Indian Court Judges Association (NAICJA), the National Association of Indian Legal Services (NAILS), and the Tribal Law and Policy Institute (TLPI).

During these consultations, some tribal officials expressed a desire to expedite the Pilot Project process, while other tribal officials asked the Department of Justice to engage in further tribal consultation before proceeding. Generally, there was a consensus that the main value of the Pilot Project will lie in (1) collaboration and information-sharing among the Pilot Project tribes; (2) flexible interaction between tribes and criminal justice experts at the Department of Justice and elsewhere; and (3) collecting the various tribal laws and procedures developed by the Pilot Project tribes that exercise SDVCJ on an accelerated basis and "sharing that information

²⁴ U.S. Department of Justice, *Implementation of Sections 904 and 908 of the Violence Against Women Reauthorization Act of 2013* (Apr. 16, 2013).

forward” with tribes that may implement VAWA 2013 and exercise SDVCJ after the Pilot Project is completed.

There also was a strong consensus in favor of tribal “self-certification”—that is, a process in which the requesting tribe provides brief written answers to detailed questions about its criminal justice system; the tribe’s leader, attorney, and chief judge each certify the completeness and accuracy of the answers; and Justice Department personnel then rely principally on those answers and thus need to engage in only limited follow-up inquiries, rather than undertake extensive investigation and site visits. At the same time, tribal officials recognized that the Department of Justice has a responsibility to exercise due diligence in assessing tribes’ capacities and therefore must at times review extrinsic evidence of tribes’ compliance with the new federal law’s requirements, including tribal constitutional provisions, tribal code provisions, tribal court rules, tribal administrative orders, tribal written policies, and tribal written procedures, as well as summaries of the qualifications of certain tribal staff.

The Department of Justice believes that the key concerns that tribal officials highlighted at the tribal consultations in April and May 2013 have been addressed in this notice. The two-phased structure is designed to move forward quickly with implementation, yet allow adequate time for deliberation and consultation. The proposed Phase One of the Pilot Project addresses the consensus about intertribal collaboration and information-sharing. Proposed Phase Two addresses the consensus about tribal self-certification, while also providing for necessary, targeted follow-up inquiries by the Department of Justice.

Executive Orders 12866 and 13563—Regulatory Planning and Review

Because this notice is not a “significant regulatory action” under Executive Order 12866 of September 30, 1993 (“Regulatory Planning and Review”), as amended, it is not subject to review under Executive Order 12866 or 13563.

Executive Order 13132—Federalism

This notice will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Under 25 U.S.C. 1304(b)(2)-(3), a participating tribe may exercise SDVCJ only concurrently with the jurisdiction of the United States, of a state, or of both. The new law does not alter federal or state criminal jurisdiction. Therefore, in accordance with Executive Order 13132 of August 4, 1999, this notice does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Executive Order 12988—Civil Justice Reform

This notice meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988 of February 5, 1996.

Regulatory Flexibility Act

Because this notice is not required to be published as a proposed rule under 5 U.S.C. 553, it need not be reviewed under the Regulatory Flexibility Act, 5 U.S.C. 603(a). In any event, this notice will not have a significant economic impact on a substantial number of small entities; thus, no regulatory flexibility analysis is required for that reason as well. *Id.* 605(b).

Unfunded Mandates Reform Act of 1995

This notice will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Moreover, becoming a participating tribe

and exercising SDVCJ—whether as part of the Pilot Project between now and March 2015, or at any time after March 2015—are entirely voluntary. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4.

Small Business Regulatory Enforcement Fairness Act of 1996

Because this notice does not include a rule, it need not be reviewed under section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. In any event, this notice will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. *See id.*

June 10, 2013
Date

Eric H. Holder, Jr.
Attorney General

APPENDIX

Substantive Questions for Consideration by Interested Tribes and by the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction

The following is a preliminary list of questions that tribes interested in the Pilot Project might find useful as a starting point in identifying key issues and developing a checklist of best practices for exercising special domestic violence criminal jurisdiction (SDVCJ) on an accelerated basis.

Some of the questions on this list focus on statutory requirements that Congress included in the Violence Against Women Reauthorization Act of 2013 (VAWA 2013). Other questions

touch on broader topics, such as those covered in the authorized grants to tribal governments in 25 U.S.C. 1304(f), that are potentially relevant to tribal “best practices” but clearly are not required by VAWA 2013 or any other federal law.

Many of these questions were raised during tribal consultation. The Department of Justice anticipates that they may be further discussed by members of the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG) in collaboratively developing tribal best practices.

Some—but certainly not all—of these questions touch on issues that the Department of Justice anticipates addressing in the Application Questionnaire, which will serve as a tribe’s formal request to commence exercising SDVCJ on an accelerated basis during Phase Two of the Pilot Project. The Application Questionnaire will be appended to the final notice that the Department of Justice expects to publish in the *Federal Register*, probably in late 2013.

Some of the questions in this Appendix may be answered by reference to unwritten tribal practices. But most of these questions deal with features of a tribal criminal justice system that would likely be memorialized in the tribe’s constitution, criminal code, rules of evidence, rules of criminal procedure, rules of appellate procedure, or written policies. Therefore, for each of these questions, interested tribes might consider whether amendments to their laws, rules, or policies are needed.

The Right to Trial by an Impartial Jury

Statutory Background: Section 1304(d)(3) provides that, “[i]n a criminal proceeding in which a participating tribe exercises [SDVCJ], the participating tribe shall provide to the defendant . . . the right to a trial by an impartial jury that is drawn from sources that—(A) reflect

a fair cross section of the community; and (B) do not systematically exclude any distinctive group in the community, including non-Indians.”

Section 1304(f)(3) authorizes grants to tribal governments “to ensure that, in criminal proceedings in which a participating tribe exercises [SDVCJ], jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements.” Congress has not yet appropriated funds for any grant authorized by section 1304.

Geographic Scope of the Community: For purposes of determining the composition of the jury pool for SDVCJ cases, how will the tribe define the geographic scope of the “community”? Is the “community” coextensive with the tribe’s Indian country? Is the existence or geographic scope of the tribe’s Indian country in dispute?

Membership in the Community: To be deemed a member of the relevant “community,” must a person reside within the community’s geographic scope? Does the community include persons who reside outside, but are employed within, the community’s geographic scope? Does the community include all employees of the tribe, its agencies, and its business entities?

Lists of Prospective Jurors: How will the tribe obtain and maintain an accurate, updated list of adult community members, including nonmember Indians and non-Indians, who are potentially eligible to be jurors in SDVCJ cases? In compiling the tribe’s official list of prospective jurors, what lists will the tribe use (e.g., state or local lists of registered voters or actual voters, tribal lists of registered voters or actual voters, state or tribal lists of licensed drivers, lists provided by various tribal agencies such as the tribal housing or taxing authority)? How often will those lists be updated and merged, to form the tribe’s official list of prospective jurors? Will the tribe maintain one official list of prospective jurors for SDVCJ cases and a separate official list of prospective jurors for cases with Indian defendants, or will the tribe

maintain one official list of prospective jurors for all cases? Are non-Indians (and nonmember Indians) already included in the tribe's jury pools?

Inclusiveness of the List: Approximately how many adults are members of the community? Approximately how many persons are on the tribe's official list of prospective jurors for SDVCJ cases?

Representativeness of the List: Approximately what percentage of adult community members (the population eligible to serve as jurors in SDVCJ cases) do tribal members, nonmember Indians, and non-Indians represent? For comparison, approximately what percentage of the tribe's official list of prospective jurors for SDVCJ cases do tribal members, nonmember Indians, and non-Indians represent? Will the tribe collect demographic data by questionnaire from all persons reporting for jury duty in SDVCJ cases (whether they are selected as a trial juror or not)? Is there a significant disparity between the percentage of the venire (i.e., the persons reporting for jury duty) that is non-Indian and the percentage of adult community members that is non-Indian?

Failure of Prospective Jurors to Appear: Given that the tribe lacks general criminal jurisdiction over non-Indians in the community, how will the tribe encourage non-Indians to fulfill their obligation to serve as jurors when summoned for SDVCJ cases?

Randomness of Jury Selection: What are the qualifications for eligibility for jury service (e.g., minimum age, maximum age, length of residence/membership in the community, lack of a felony conviction or pending felony charges, U.S. citizenship, ability to communicate in English or another language, etc.)? When, if ever, can prospective jurors be removed based on challenges for cause or peremptory challenges? Are there any other respects in which the selection of jurors is non-random?

Jury Verdicts: Will the tribe require unanimous guilty verdicts in SDVCJ cases?

Waiver: Under tribal law, what are the standards and procedures for determining whether a defendant is competent and has, by guilty plea or otherwise, knowingly and intelligently waived his right to have the case tried by a jury?

ICRA's Jury Right and VAWA's Impartial-Jury Right: Under section 1304(d)(3), as enacted in VAWA 2013, a participating tribe must provide the defendant in an SDVCJ case an absolute right to a jury trial, regardless of whether the offense is punishable by imprisonment, and regardless of whether the person accused requests a jury trial. Under section 1302(a)(10), as enacted in the Indian Civil Rights Act of 1968 (ICRA), tribes cannot “deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.” Because section 1304(d)(3) does not so qualify the right to a trial by an impartial jury, the right to a trial by an impartial jury in an SDVCJ case applies even if the defendant does not expressly request a jury trial and even if the offense is not punishable by imprisonment. Are the tribe's laws consistent with these federal statutory rights?

The Rights Described in the Tribal Law and Order Act of 2010

Statutory Background: Section 1304(d)(2) provides that, “[i]n a criminal proceeding in which a participating tribe exercises [SDVCJ], the participating tribe shall provide to the defendant . . . [,] if a term of imprisonment of any length may be imposed, all rights described in section 202(c) [of ICRA].”

As amended by the Tribal Law and Order Act of 2010 (TLOA), ICRA's section 202(c), codified at 25 U.S.C. 1302(c), describes five rights, all of which will apply in SDVCJ cases in which imprisonment may be imposed:

In a criminal proceeding . . . , the Indian tribe shall—

- (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
- (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
- (3) require that the judge presiding over the criminal proceeding—
 - (A) has sufficient legal training to preside over criminal proceedings; and
 - (B) is licensed to practice law by any jurisdiction in the United States;
- (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
- (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

25 U.S.C. 1302(c).

Section 1304(f)(2) authorizes grants to tribal governments “to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order.” This provision expressly refers to all such criminal proceedings and is not limited to SDVCJ cases with non-Indian defendants.

Section 1304(f)(1) authorizes grants to tribal governments, among other things, “to strengthen tribal criminal justice systems to assist Indian tribes in exercising [SDVCJ], including . . . prosecution; . . . trial and appellate courts; . . . [and] criminal codes and rules of criminal procedure, appellate procedure, and evidence.”

General Questions on the TLOA Rights

Felony Sentencing Under TLOA: With TLOA's enactment, the rights described in 25 U.S.C. 1302(c) must be protected in all criminal cases in which a tribe "imposes a total term of imprisonment of more than 1 year on a defendant." Since TLOA was enacted on July 29, 2010, have the tribe's courts sentenced any criminal defendant to a total term of imprisonment of more than one year? If not, does the tribe have plans to commence exercising this enhanced sentencing authority under TLOA?

Cases in Which Imprisonment "May Be Imposed": Under tribal law, in what circumstances, if any, may a criminal defendant who was sentenced only to pay a criminal fine and not to serve a term of imprisonment be imprisoned for failure to pay the fine?

Defense Attorneys

Effective Assistance of Licensed Defense Attorneys: In criminal proceedings in which the tribe will exercise SDVCJ and terms of imprisonment of any length are or may be imposed, how will the tribe protect defendants' right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution? In such criminal proceedings, how will the tribe provide to indigent defendants, at the expense of the tribal government, the assistance of defense attorneys licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys? Will indigent Indian defendants be afforded the same rights as indigent non-Indian defendants, at least in cases involving crimes of domestic violence or dating violence or criminal violations of protection orders?

Qualifications of Licensed Defense Attorneys: In answering the following questions, it may be helpful to focus on each individual attorney who the tribal government pays to assist indigent defendants in criminal proceedings in the tribe's courts. Where is the attorney licensed

to practice law (including state and tribal jurisdictions)? Would the attorney be qualified to continue representing an indigent defendant in federal district court by filing a petition for a writ of habeas corpus under 25 U.S.C. 1303? Are the tribe's appointed defense attorneys provided with and required to attend continuing legal education? Overall, how do the appointed defense attorneys' licenses to practice law and qualifications to represent clients in tribal and federal courts compare to those of the tribe's prosecutors?

Tribal Licenses to Practice Law: If the tribe licenses attorneys to practice law, what professional licensing standards (including educational requirements) does the tribe apply? How does the tribe effectively ensure the competence and professional responsibility of its licensed attorneys?

Independence of Defense Attorneys: What measures does the tribe take to ensure that appointed defense attorneys are free from political and financial influence and can exercise independent professional judgment?

Caseload: If the tribe hires full-time public defenders, how many cases do they carry per year, on average?

Criminal Defense Support: Do the tribe's appointed defense attorneys have meaningful access to investigative and expert services?

Indigency: In cases in which indigent defendants have a right to appointed counsel, does the tribe provide free criminal defense services to all defendants, to all defendants who request counsel, or to all defendants who request counsel and demonstrate that they are financially unable to obtain adequate representation without substantial hardship? If a defendant must demonstrate eligibility, what are the tribe's standards for making this determination?

When the Right Attaches: In cases in which the tribe provides appointed counsel, how soon after arrest, detention, or request for counsel are defense attorneys assigned and made available to the defendant? Under tribal law, does a defendant's right to appointed counsel extend to cases in the tribe's appellate courts?

Waiver: Under tribal law, what are the standards and procedures for determining whether a defendant is competent and has knowingly and intelligently waived his right to counsel?

Tribal Judges

Licensed, Legally Trained Judges: In criminal proceedings in which the tribe will exercise SDVCJ and terms of imprisonment of any length are or may be imposed, how will the tribe ensure that the judges presiding over the criminal proceedings (pretrial, at trial, and on appeal) have sufficient legal training to preside over criminal proceedings and are licensed to practice law by any jurisdiction in the United States?

Qualifications of Licensed Judges: In answering the following questions, it may be helpful to focus on each individual judge who presides over criminal proceedings in the tribe's courts. Where is the judge licensed to practice law (including state and tribal jurisdictions)? What legal training to preside over criminal proceedings has the judge received? How many years of experience does the judge have in practicing law and in serving on the bench? How do the judges' licenses, legal training, and experience compare to those of the state or local judges who preside over similar criminal proceedings in cases arising in or near the tribe's Indian country?

Legal Training for Judges: Does the tribe have any law, rule, or policy defining what constitutes sufficient legal training to preside over criminal proceedings? Are the judges who

preside over the tribe's criminal proceedings provided with and required to attend continuing legal education?

Tribal Laws and Rules

Public Access to Tribal Laws and Rules: How will the tribe provide to the defendants and their licensed defense attorneys, prior to charging the defendant, the right to review, along with other members of the public, the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government? How and where can a member of the public access these laws and rules? Is there any fee or charge for reviewing these laws or rules? Are they freely available on the Internet?

Scope of the Publicly Available Laws and Rules: What types of regulations, if any, constitute part of the tribe's criminal laws? What types of interpretative documents, if any, constitute part of the tribe's criminal laws? Do these documents include judicial opinions? Are the tribe's rules of appellate procedure accessible in the same manner as the rules of evidence and criminal procedure?

Judicial Standards: Does the tribe have written rules or codes for judicial performance and conduct, including rules governing the recusal of tribal judges in appropriate circumstances?

Tribal Court Records

Records of Criminal Proceedings: How will the tribe maintain and provide to defendants in SDVCJ cases a record of criminal proceedings, including an audio or other recording of the trial proceedings? What form do these records or recordings take (e.g., a court reporter's transcript, an audio recording, a video recording, etc.)? Does the tribe waive any fee for obtaining these records or recordings if the defendant is indigent?

Habeas Corpus Rights

Statutory Background: Section 1304(d)(1) provides that, “[i]n a criminal proceeding in which a participating tribe exercises [SDVCJ], the participating tribe shall provide to the defendant . . . all applicable rights under this Act.” The term “this Act” refers to ICRA, 25 U.S.C. 1301-1304, as amended, including by TLOA in 2010 and by VAWA 2013.

Section 1304(e)(3) provides that “[a]n Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under [subsection 1304(e)] and under section [1303].” Section 1303 provides that “[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.” Section 1304(e)(1) provides that “[a] person who has filed a petition for a writ of habeas corpus in a court of the United States under section [1303] may petition that court to stay further detention of that person by the participating tribe”—that is, to be released from the tribe’s custody. Section 1304(e)(2) provides the criteria for granting such a stay.

The Tribe’s ICRA Compliance: If in recent years (for example, in the last decade) any person detained by order of the tribe has prevailed in a federal habeas case against the tribe under 25 U.S.C. 1303, or any federal or tribal court has found that the tribe violated a criminal defendant’s rights, has the tribe adopted (or is it planning to implement) changes or new procedures to avoid such issues in the future? More generally, if challenged by a habeas petitioner, how can the tribe document a track record of complying with the rights described in ICRA’s section 1302?

Timely Notice of Habeas Rights: When and how does the tribe timely notify each person whose detention it has ordered of his rights and privileges under both 25 U.S.C. 1303 and 25 U.S.C. 1304(e)?

Other Rights Protected by the Indian Civil Rights Act of 1968

Statutory Background: Section 1304(d)(1) provides that, “[i]n a criminal proceeding in which a participating tribe exercises [SDVCJ], the participating tribe shall provide to the defendant . . . all applicable rights under this Act [25 U.S.C. 1301-1304].”

Section 1302(a) provides the following rights, some of which may have few, if any, applications in SDVCJ cases:

No Indian tribe in exercising powers of self-government shall—

- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
- (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- (3) subject any person for the same offense to be twice put in jeopardy;
- (4) compel any person in any criminal case to be a witness against himself;
- (5) take any private property for a public use without just compensation;
- (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense . . . ;
- (7) (A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

* * *

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. 1302(a).

Tribal Self-Assessment for Each Applicable Right: For each of the individual rights described in paragraphs (1) through (10) of section 1302(a) that might apply in an SDVCJ case, how do the tribe's laws, rules, policies, and practices protect a criminal defendant's rights? The answers may reflect not only the tribe's written laws, rules, and policies, but also the actual, on-the-ground practices in the tribe's criminal justice system. This self-assessment includes section 1302(a)(8), which prohibits a tribe from denying to any person "the equal protection of its laws" or depriving any person of "liberty or property without due process of law."

Custodial Interrogation: Prior to custodial interrogation, does the tribe advise the suspect that he has the right to remain silent, that any statement he makes may be used against him in court, and that he has the right to obtain counsel and, if indigent, to have counsel appointed for him?

Criminal Discovery: Does the tribe allow criminal defendants to discover the evidence against them? Does the tribe require prosecutors to disclose exculpatory evidence to criminal defendants?

Language Access: Does the tribe protect the defendant's right to have the free assistance of an interpreter if he cannot understand or speak the language used in court?

Juvenile Defendants: Will the tribe exercise SDVCJ over any person who was less than 18 years of age at the time of the offense? If so, in what respects, if any, will the tribe treat the juvenile defendant differently from an adult defendant?

Appeals: Does the tribe provide every person convicted of a tribal crime the right to appeal the conviction, the sentence, or both to a tribal or intertribal appellate court composed of judges who have sufficient legal training, were not involved in the trial proceedings, and do not serve as legislative or executive officers of the tribe? Under tribal law, can the prosecution appeal a jury's not-guilty verdict?

Equal Protection of the Tribe's Laws: How will the tribe guarantee the equal protection of its laws to Indian defendants who are not subject to SDVCJ? Will Indian defendants have the same rights as similarly situated non-Indian defendants, and vice versa?

Tribal Remedies for Violations of Defendants' Rights: Under tribal law, if a tribal court finds that the rights of a criminal defendant were violated, what remedies are available to the court?

Tribal Criminal Code Provisions Specifically for SDVCJ Cases

Statutory Background: Section 1304(b)(4)(A)(i) provides that “[a] participating tribe may not exercise [SDVCJ] over an alleged offense if neither the defendant nor the alleged victim is an Indian.” That is simply a restatement of the long-standing case law providing exclusive state (rather than tribal) jurisdiction over most Indian-country crimes involving only non-Indians. ICRA’s section 1301(4) defines an Indian as “any person who would be subject to the jurisdiction of the United States as an Indian under [18 U.S.C. 1153] if that person were to commit an offense listed in that section in Indian country to which that section applies.”

Section 1304(b)(4)(B) provides that “[a] participating tribe may exercise [SDVCJ] over a defendant only if the defendant . . . resides in the Indian country of the participating tribe; . . . is employed in the Indian country of the participating tribe; or . . . is a spouse, intimate partner, or dating partner of . . . a member of the participating tribe . . . [or] an Indian who resides in the Indian country of the participating tribe.” This provision ensures that a non-Indian defendant has sufficient ties to the prosecuting tribe.

Victim and Defendant Are Both Non-Indian: Will the tribe’s criminal code require prosecutors in cases with non-Indian defendants to allege and then prove beyond a reasonable doubt that the victim is Indian? Are special jury instructions needed?

Defendant’s Ties to the Indian Tribe: Will the tribe’s criminal code require prosecutors in SDVCJ cases to allege and then prove beyond a reasonable doubt that the defendant resides in the tribe’s Indian country; is employed in the tribe’s Indian country; or is a spouse, intimate partner, or dating partner either of an Indian who resides in the tribe’s Indian country or of a member of the tribe? Are special jury instructions needed?

Concurrent Criminal Jurisdiction

Statutory Background: Section 1304(b)(2) provides that “[t]he exercise of [SDVCJ] by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.” And section 1304(b)(3) provides that “[n]othing in . . . section [1304] . . . creates or eliminates any Federal or State criminal jurisdiction over Indian country; or . . . affects the authority of the United States[,], or any State government that has been delegated authority by the United States[,], to investigate and prosecute a criminal violation in Indian country.”

Tribal Coordination with Federal (or State) Prosecutors: Has the tribe developed formal or informal policies with the relevant U.S. Attorney’s Office or Offices (or, where the state has

concurrent jurisdiction, the relevant state or local prosecutor) for coordination, abstention, or deferral in cases in which more than one government seeks to investigate or prosecute the same defendant for substantially the same act or acts? Are any prosecutors for the tribe currently serving as Special Assistant United States Attorneys (SAUSAs) under 25 U.S.C. 2810(d) or 28 U.S.C. 543(a)?

The Tribe's Laws on Domestic Violence and Dating Violence

Statutory Background: Section 1304(c) provides that “[a] participating tribe may exercise [SDVCJ] over a defendant for criminal conduct that falls into one or more of the following categories” The first category, described in section 1304(c)(1), is “[a]n act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.”

Section 1304(a)(2) defines the term “domestic violence” as “violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.” Under section 1304(a)(7), which in turn incorporates 18 U.S.C. 2266(7), the term “spouse or intimate partner” includes “a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; or . . . a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship; and . . . any other person similarly situated to a spouse who is protected by the

domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.”

Section 1304(a)(1) defines the term “dating violence” as “violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.”

Specialized Court or Docket: Does the tribe have a specialized domestic violence and dating violence court, or a specialized domestic violence and dating violence docket?

The Tribe’s Criminal Code and SDVCJ Cases: Does the tribe’s criminal code establish offenses for acts of domestic violence and dating violence that fall squarely within the category of criminal conduct covered by section 1304(c)(1)? Or will these acts be prosecuted under a general assault statute in which the relationship between the defendant and the victim is not an element of the offense?

Arresting Perpetrators: Do the tribe’s laws or policies encourage or mandate arrests of domestic violence and dating violence offenders based on probable cause that an offense has been committed? Do the tribe’s laws or policies authorize warrantless arrests of domestic violence and dating violence offenders based on probable cause that a misdemeanor has been committed? Do the tribe’s laws, policies, or practices discourage dual arrests of offender and victim?

The Tribe’s Laws on Protection Orders

Statutory Background: Section 1304(c) provides that “[a] participating tribe may exercise [SDVCJ] over a defendant for criminal conduct that falls into one or more of the following categories” The second category, described in section 1304(c)(2), is “[a]n act

that—(A) occurs in the Indian country of the participating tribe; and (B) violates the portion of a protection order that . . . prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; . . . was issued against the defendant; . . . is enforceable by the participating tribe; and . . . is consistent with [18 U.S.C. 2265(b)].”

Section 1304(a)(5) defines a “protection order” to mean “any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person,” including “any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent[e] lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.”

A protection order issued by a state, tribal, or territorial court is consistent with 18 U.S.C. 2265(b) if “such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and . . . reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person’s right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent’s due process rights.”

As amended by VAWA 2013’s section 905, 18 U.S.C. 2265(e) now provides that a tribal court “shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising

anywhere in the Indian country of the Indian tribe (as defined in [18 U.S.C.] 1151) or otherwise within the authority of the Indian tribe.”

The Tribe’s Criminal Code and SDVCJ Cases: Does the tribe’s criminal code establish offenses for protection-order violations that fall squarely within the category of criminal conduct covered by section 1304(c)(2)?

Tribal-Court Issuance of Protection Orders: Do the tribe’s laws or rules authorize the tribe’s courts to issue protection orders, as defined in section 1304(a)(5), involving any person, Indian or non-Indian, in matters arising anywhere in the tribe’s Indian country or otherwise within the tribe’s authority?

Mutual Restraining Orders: Do the tribe’s laws, policies, or practices prohibit issuance of mutual restraining orders of protection except in cases in which both parties file a claim and the court makes detailed findings of fact indicating that both parties acted primarily as aggressors and that neither party acted primarily in self-defense?

Tribal Registry: Do the tribe’s courts maintain a registry of the protection orders they issue?

Tribal-Court Enforcement of Protection Orders: Do the tribe’s courts enforce protection orders, as defined in section 1304(a)(5), involving any person, Indian or non-Indian, in matters arising anywhere in the tribe’s Indian country or otherwise within the tribe’s authority? What mechanisms do the tribe’s courts use to enforce protection orders? Do the tribe’s laws or policies encourage or mandate arrest of domestic violence offenders who violate the terms of a valid and outstanding protection order?

Cross-Jurisdiction Recognition of Protection Orders: Do the tribe's courts recognize and enforce protection orders issued by the courts of the state or states in which the tribe's Indian country is located, and vice versa?

Internet Publication: Do the tribe's laws or policies prevent publication on the Internet of the registration or filing of a protection order if such publication would reveal the identity of the party protected by the order?

Tribal Protection of Victims' Rights

Statutory Background: Section 1304(f)(1)(G) authorizes grants to tribal governments, among other things, "to strengthen tribal criminal justice systems to assist Indian tribes in exercising [SDVCJ], including . . . culturally appropriate services and assistance for victims and their families." Section 1304(f)(4) authorizes grants to tribal governments "to accord victims of domestic violence, dating violence, and violations of protection orders rights that are similar to the rights of a crime victim described in [18 U.S.C. 3771(a)], consistent with tribal law and custom."

Eight rights of crime victims are described in 18 U.S.C. 3771(a), a federal statute that does not directly apply to or impose obligations on tribes or tribal courts:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.

- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. 3771(a).

Crime Victims' Rights Under Tribal Law: How do the tribe's laws, rules, policies, and practices protect the rights of victims of domestic violence and dating violence, consistent with tribal law and custom, while providing victim services and assistance in a manner appropriate to the tribe's culture?

Availability of Victim Services and Assistance: Do the tribe's laws or policies make services and assistance available to victims of domestic violence or dating violence, regardless of the victim's decision to report the crime to law enforcement or cooperate in any law enforcement investigation and regardless of the victim's relationship to the alleged perpetrator?

Safety Planning: Do the tribe's laws or policies encourage safety planning with victims of domestic violence or dating violence who report crimes or seek services?

Victim Notification: Does the tribe operate its own victim notification system? Does the tribe participate in the victim notification system of each state in which the tribe's Indian country is located?

Confidential Victim Information: Do the tribe's laws or policies prevent domestic violence service provider programs from sharing confidential victim information with outside organizations or individuals without the victim's documented consent?

Juvenile Victims: Are there any special provisions in the tribe's laws, rules, or policies that would apply in an SDVCJ case because the victim is less than 18 years of age?

Detention, Corrections, Probation, and Parole

Statutory Background: Section 1304(f)(1)(D)-(F) authorizes grants to tribal governments, among other things, “to strengthen tribal criminal justice systems to assist Indian tribes in exercising [SDVCJ], including . . . probation systems; . . . detention and correctional facilities; . . . [and] alternative rehabilitation centers.”

Non-Indian Inmates: Does any federal, state, local, or tribal statutory, regulatory, or contractual provision prohibit the tribe from housing non-Indians accused or convicted of tribal criminal offenses in the same jails and prisons in which the tribe houses Indians accused or convicted of tribal criminal offenses?

Where Tribal Sentences Are Served: Does the tribe have a tribal correctional center appropriate for both short- and long-term incarceration? Does the tribe have an alternative rehabilitation center? Does the tribe have an agreement with a state or local government to house prisoners in a state or local government-approved detention or correctional center that is appropriate for both short- and long-term incarceration?

Alternative Punishments: Does the tribe sentence defendants in domestic violence or dating violence cases to serve alternative forms of punishment, as determined by a tribal judge under tribal law, or consistent with tribal custom or traditional tribal dispute resolution?

Batterer-Intervention Programs: Does the tribe have a court-ordered and court-monitored batterer intervention program (BIP) to hold batterers accountable for their behavior without incarcerating them? Do the tribe’s courts hold accountable the batterers who fail to complete such court-ordered BIPs?

Probation or Parole and Reentry: Does the tribe have or provide access to a reentry program for defendants who have been incarcerated?

Crime Information Databases

Statutory Background: Section 1304(f)(1)(A) authorizes grants to tribal governments, among other things, “to strengthen tribal criminal justice systems to assist Indian tribes in exercising [SDVCJ], including . . . law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases).”

Tribal Databases: Do the tribe’s law enforcement or court personnel maintain a criminal justice information repository, such as a database of convicted persons?

State Databases: Do the tribe’s court personnel enter protection orders into the state protection-order database for the state or states in which the tribe’s Indian country is located?

CJIS Databases: Do the tribe’s court personnel (1) enter protection orders into the FBI Criminal Justice Information Services (CJIS) National Crime Information Center (NCIC) Protection Order File; and (2) enter data (e.g., orders committing a person to a mental institution) into CJIS’s National Instant Criminal Background Check System (NICS) Index? Do the tribe’s law enforcement personnel, court personnel, or both (1) obtain criminal history information from CJIS databases; (2) enter court disposition data into CJIS databases; (3) enter arrest warrants into CJIS’s NCIC Wanted Person File; (4) enter information about sex offenders into the CJIS’s NCIC/National Sex Offender Registry (NSOR); and (5) take fingerprints from arrestees and submit fingerprint data to CJIS’s Integrated Automated Fingerprint Identification System (IAFIS)?

UCR Data: Do the tribe’s law enforcement personnel submit Uniform Crime Reporting (UCR) data? If so, is the UCR data submitted directly to FBI CJIS, through the Bureau of Indian Affairs’ Office of Justice Services (BIA-OJS), through the state, or through some other route?

Commencing to Exercise SDVCJ

Statutory Background: In authorizing funding for these purposes, section 1304(h) recognizes the potential need “to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes.” VAWA 2013’s section 908(b)(2)(C) provides that the date on which a participating tribe may commence exercising SDVCJ under the Pilot Project must be “established by the Attorney General, after consultation with that Indian tribe.”

Training and Technical Assistance: What additional training or technical assistance, if any, is needed by the tribe’s officers, employees, or contractors before commencing the exercise of SDVCJ?

Data Collection and Assessment: For the duration of the Pilot Project period (i.e., until March 7, 2015), would the tribe be willing to actively participate in the ITWG and collect and analyze data on the tribe’s SDVCJ cases (and any resulting federal habeas cases)?

[FR Doc. 2013-14158 Filed 06/13/2013 at 8:45 am; Publication Date: 06/14/2013]